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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2005

ALBERTO R. GONZALES, Attorney General of the United States, *et al.*,
Petitioners,

v.

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, et al.,
Respondents

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The United States Conference of Catholic Bishops ("USCCB") is a nonprofit corporation, the members of which are the active Catholic Bishops of the United States.[1] USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the Conference are the protection of the First Amendment rights of religious

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that they authored this brief, in whole, and no person or entity other than the amicus made a monetary contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief. Letters of consent are filed herewith.

organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

The consequences of the Court's opinion in *Employment Division v. Smith*, 494 U.S. 872 (1990), are varied and severe for religious organizations. The demands of government regulators collide with the practice of religion and the prospects for accommodations improve in inverse proportion to the strength of interest group politics. In point of fact the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*, provides important relief for religious organizations that find that religious doctrine which does not reflect the cultural norm is often treated with disdain in the legislature. *Smith* widened the door to such treatment by removing the chances of meaningful judicial review. It deserves further attention by the Court.

SUMMARY OF ARGUMENT

The adverse consequences of *Employment Division v. Smith*, 494 U.S. 872 (1990), are deep and numerous for religion. Casting aside a history and tradition of affirmative protection for religious freedom, the ruling in *Smith* makes the Free Exercise Clause a mere nondiscrimination rule, relegating the protection of religion to the political process. In so doing, *Smith* particularly disserved the interests of religious organizations, which often require accommodation to be able to act consistently with religious principles in a heavily regulated society such as ours. This is vividly illustrated in this case, in which the government's fundamental position is that once the legislature has decided that a substance belongs on one of the schedules of the Controlled Substances Act, 21 U.S.C. §§ 801-904, the Religious Freedom Restoration Act becomes a virtual "dead letter".

The UDV's posture in this matter is the archetypal situation where increased protection for religious exercise is

called for. No personal, subjective claim of a right to be exempted from the general criminal laws, or to use hoasca tea other than as part of a religious sacrament, is at issue. Rather, the question is whether this religion's right to administer its sacraments during its religious services will be tested by application of the compelling interest test Congress decided would apply under the Religious Freedom Restoration Act. We submit that institutional problems are a different subset of issues than individualized claims for exemption. They are less numerous but affect far more people. And the conflict with well-established religious principles is often clear and unequivocal.

Many of the same kinds of challenges faced by UDV here are common to other religious organizations and activities around the country. As detailed below, regulators believe they can force religious hospitals to perform abortions, charities to pay for insurance covering medical procedures they consider sinful, and agencies to prove their governmentally-measured religiosity. Religious entities are confronting a governmental orthodoxy that assumes the power to coerce these entities to subsidize conduct they teach is sinful. All are the result of putatively neutral laws and all are intensely intrusive into the very center of these organizations' religious being.

"The long, unedifying history of the contest between the secular state and the church is replete with instances of attempts by civil government to exert pressure upon religious authority." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 124-25 (1952) (Frankfurter, J., concurring). Justice Frankfurter's observation has greater impact since this Court's ruling in *Employment Division v. Smith*. By removing the preexisting balancing of religious objections to government regulation, and ignoring the difference between objections based on constitutionally protected religious principle and those based on simple personal preference, the Court has opened the door to greater

governmental invasion of the very precincts and practices of religious institutions. The Religious Freedom Restoration Act, whose construction is at issue in the case at bar, is one attempt to balance regulatory intrusions into religion, against the real needs of the State. But the real source of the difficulty which the Act attempts to remedy is *Smith* itself. In this brief the Conference calls the Court's attention to ways in which *Smith* has been used to expand the authority of government at the expense of religious principles. Although the Court is called upon here only to construe the Act, plainly the conflicts traceable to *Smith* will continue to fester until this Court restores balance to the law affecting the rights of religious institutions in a free society.

ARGUMENT

The instant case exemplifies the inevitable conflicts that arise when the demands of religious conscience and belief, and the demands of the state to regulate society, clash. The issue becomes particularly significant where the government's actions do not merely have an incidental or unintentional effect on religious practice, but rather where the government has explicitly proscribed that which religion, equally explicitly, prescribes. The Court in *Employment Division v. Smith* ruled that such conflicts, unless discriminatory in some way, are no longer remediable under the Free Exercise Clause. The result has been the opening of regulatory doors to all sorts of new initiatives that impair the legitimate rights of religious entities to order their activities according to religious principles. Rather than serving as an avenue of protection for religious organizations (especially minority religions, in number or philosophy), the Free Exercise Clause now seems largely subject to the political process, a result which the *Smith* majority candidly observed leaves those same minorities at a "relative disadvantage." *Compare West Virginia Board of Education v.*

Barnette, 319 U.S. 624, 638 (1943), with *Smith*, 494 U.S. at 890.

In policing the line between the appropriate precincts of religion and the state, the pre-*Smith* jurisprudence supplied a useful balancing test that recognized the affirmative protections that the Free Exercise Clause – the "fundamental freedom"[2] – accorded to religion, and at the same time recognized that there were situations where the government could take steps to protect the populace from serious harm even if religious practice was impinged upon. *Smith* abandoned a balancing test in which the demands of the State could be evaluated in a way that reflected the affirmative mandate of the Free Exercise Clause. RFRA's function was to revive that test, and in so doing is vital to the protection of religious liberty. The current conflict over the meaning and effect of RFRA is the logical result, in large measure, of problems created by the decision in *Smith*. Uncertainties about the reach of this Court's law on institutional religious freedom and its connection to *Smith* warrant attention by this Court.

I. The Underlying Deficiencies of *Smith*, and Their Impact on the Instant Case.

The *Smith* majority effectively reduced Free Exercise jurisprudence, which had previously shown a benevolent neutrality towards religious exercise, to a "one size fits all" rule that no constitutionally cognizable injury to religious exercise can occur from the imposition of a generally applicable, neutral rule, no matter its impact. *Smith*, 494 U.S. at 878. It validates putatively neutral regulation that unjustly has an impact on

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[2] *Everson v. Board of Education*, 330 U.S. 1, 43 n.13 (1947) (Rutledge, J., dissenting (quoting Irving Brant, *James Madison: The Virginia Revolutionist* 243 (1941))).

religion, and deprives religious exercise of an effective remedy. While the pre-*Smith* law was not without flaw,[3] there was a hurdle to be surmounted before a state could prevent conduct motivated by religion, in the form of the compelling interest test. RFRA and similar measures are important tools for religious organizations in their dialogue with, and when necessary resistance to, government regulators.[4]

Smith, on the other hand, permits regulators to mandate conformity to particular political or cultural ideals even where a religious accommodation would not cause grave harm to the body politic. It allows the regulatory state to hide the anti-religious effects of, or motives for, official actions. It removed

[3] Judge Noonan's opinion in *EEOC v. Townley Engineering* 859 F.2d 610, 622-5 (9th Cir. 1988) (Noonan J., dissenting) catalogued the ways in which religion had lost these encounters with the State. After RFRA, religion prevailed to a greater extent than many thought. *Protecting Religious Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (July 14, 1997) (statement of Mark E. Chopko, General Counsel, United States Catholic Conference), found at http:/judiciary.house.gov/legacy/222307.htm (last visited on August 31, 2005).

[4] "Although much has been said about the litigation potential of RFRA, the real power of the Religious Freedom Restoration Act, I believe, lay in its use in negotiation and persuasion in numerous local and administrative disputes across the country. The ability to have some legal basis on which religious persons and organizations could depend as a starting point in negotiations was an enormous benefit in continuing to give life to our tradition that, although our practices are diverse and plural, our devotion to the protection of religious liberty remains singular and supreme. RFRA gave religious people and their organizations the right to insist that accommodation, not conformity, be the norm." *Testimony in Support of Proposed Legislative Solutions to Employment Division v. Smith and City of Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (March 26, 1998) (statement of Mark E. Chopko, General Counsel, United States Catholic Conference), found at http:/judiciary.house.gov/legacy/222353.htm (last visited August 31, 2005).

a check upon government behavior that had previously provided religion with a substantive test to which challenged government actions could be put, which had offered hope for relief when even "neutral" policies interfered with religious principles.

Religion is deeply personal, and religious belief varies widely. In a United States becoming more religiously diverse, there is a legitimate concern about the myriad and competing demands placed on government. *Cf. Bowen v. Roy*, 476 U.S. 693, 699 (1986) (plurality) (no right to insist that government policies accord with religious belief). This concern is made more difficult to balance because religion is not something that can be or has been relegated to the realm of the purely personal. Belief begets conduct reflecting that belief, and religious believers joined with others into faith communities have the right to practice what they preach through those communities.

Both private beliefs and organized, public, religious activities are protected by the Religion Clauses.[5] Writing for four dissenting Justices in *Lee v. Weisman*, 505 U.S. 577, 633 (1992), Justice Scalia dismissed the notion that our Constitution "restricts 'preservation and transmission of religious beliefs . . . to the private sphere'". He identified a number of organized public religious activities that have occurred throughout our

[5] "Wisconsin . . . argues that 'actions', even though religiously grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause . . . . [T]o agree that religiously grounded conduct must often be subject to the broad police powers of the state is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the state to control, even under regulations of general applicability . . . . A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion". *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972).

history, and have been upheld by the Court's own decisions. *Id.* at 633-36. "Church and state would not be such a difficult subject if religion were . . . some purely personal avocation that can be indulged entirely in secret . . . in the privacy of one's room." *Id.* at 645. But it is not, which is why legal protection for religious expression is important.

A Free Exercise Clause that rigorously protects religion only when singled out for adverse treatment is an eviscerated right, even if a protected one. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). *Cantwell* exempted religious exercise from a rule which prohibited solicitation of funds for religious, charitable or philanthropic causes unless approved by a state authority. The statute did not purport to regulate religious belief or proselytism, and on its face only prevented unlicensed solicitations and applied to all fundraising for every religious, charitable or philanthropic cause. It appears "neutral" and "generally applicable". But the Court decided that "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution". *Cantwell*, 310 U.S at 307. The *Cantwell* Court allowed the state only to "define and punish specific conduct . . . constituting a clear and present danger to a substantial interest of the State". *Id* .at 311. The *Smith* rule would permit a different result in *Cantwell*.[6]

The circumstances of *Mockaitis v. Harcleroad*, 104 F.3d

[6] As *Smith* noted, 494 U.S. at 881, Cantwell's claim also involved Free Speech issues. The *Cantwell* majority does not treat the issues separately but effectively borrows the Free Speech rubric and applies it to religious expression, warning that the suppression of religious ideas risks more than intolerance but tyranny. *Cantwell*, 310 U.S. at 310.

1522 (9th Cir. 1997), exemplify this point. There, a District Attorney caused a suspect's sacramental confession to a priest, while in jail, to be tape-recorded and transcribed for use in the investigation, and presumably for use at trial. After unsuccessful litigation in the State courts, a federal challenge was filed. The Ninth Circuit held that the taping of the confession violated RFRA and that use of the least restrictive means to advance a compelling government interest had not been shown. It remanded with directions to enter declaratory and injunctive relief. *Mockaitis*, 104 F.3d at 1530-31. But for the application of RFRA's compelling interest test, the state would have succeeded in violating not only the suspect's, but also the priest's and the Church's, free exercise rights based on its policy that all jailhouse exchanges were uniformly taped for investigative reasons having no relation to religion. *Id.* at 1525.

Even general criminal prohibitions have traditionally been subject to vigorous Free Exercise review under the compelling interest test. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court decided that even Wisconsin's undoubted interest in furthering the education of children did not outweigh the interest of Amish parents in exercising their religious beliefs against the public schooling of children beyond the eighth grade. The Court in *Yoder* applied the compelling interest test developed, in *Sherbert v. Verner*, 374 U.S. 398 (1963), in the context of a denial of unemployment benefits due to a religiously-based refusal by a Seventh-day Adventist to accept Saturday work. *See also McDaniel v. Paty*, 435 U.S. 618, 628 (1978).[7] As described by the Court in *Locke v. Davey*, 540

[7] Before the *Smith* decision, the Court's determination not to apply the compelling interest test in Free Exercise cases had been limited to those narrow circumstances like *Bowen v. Roy*, 476 U.S. 693 (1986), and *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), where plaintiffs argued that the Free Exercise Clause "require[s] the government itself to behave in ways that the individual believes will further his or her spiritual development . . . [and] require[s] the Government to

U.S. 712, 720 (2004), criminal sanctions are a substantial burden. Indeed, as Justice O'Connor pointed out in her concurrence in *Smith*, the imposition of criminal sanctions for religiously motivated conduct "burdens that individual's free exercise of religion in the *severest manner possible*, for it results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution'". *Smith*, 494 U.S. at 898 (O'Connor, J., concurring)(emphasis supplied). This is a particularly draconian consequence where, as here, it is the very core of the UDV religion, the participation in its central sacrament, that UDV faithful must forego to comply with the Controlled Substance Act, and that the church itself may not pursue.

It was for this reason, among others, that Justice O'Connor in *Smith* rejected the same substantive argument the government makes in the instant case. The government argues that it may penalize UDV, not as a result of any individualized assessment of the facts and circumstances presented in this case, but because Congress included a substance vital to the UDV religion in a general statute. Justice O'Connor wrote that:

> the sounder approach – the approach more consistent with our role as judges to decide each case on its individual merits – is to apply this test in each case to determine whether the *burden on the specific plaintiffs*

conduct its own internal affairs in ways that comport with the religious beliefs" of particular litigants, an argument the Court rejected. *Bowen*, 476 U.S. at 699. And in certain other cases, like *Goldman v. Weinberger*, 475 U.S. 503 (1986), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), the government was found to be entitled to a more deferential standard of review because the military and prisons were administered and tightly regulated by the government. These were exceptions, not the rule, as the contemporaneous and subsequent application of a compelling interest Free Exercise test shows. *Hobbie v. Unemployment Appeals Comm. of Florida*, 480 U.S. 136 (1987); *Hernandez v. Commissioner*, 490 U.S. 680 (1989).

> *before us* is constitutionally significant and whether the *particular criminal interest* asserted by the State before us is compelling. Even if, as an empirical matter, a government's criminal laws might *usually* serve a compelling interest in health, safety or public order, the First Amendment *at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim.*

Smith, 494 U.S. at 899 (O'Connor, J., concurring) (emphasis supplied). This is because religion is, in our constitutional framework, a preferred value, and affirmatively protected by the Free Exercise Clause,[8] and a specific and particularized assessment of the claimed governmental interests weighed against the religious burden on the plaintiffs should be required before interference with a religious practice.

If it were a sufficient answer to say, as the majority suggests in *Smith*, that all citizens are equally subject to criminal laws and so minority religions are simply unavoidably disfavored by the law and have no recourse, then in substance the Free Exercise Clause can no longer be seen as preserving religious liberty at all, but rather as imposing simple majority rule. Under *Smith* – and as the government argues here – the courts will no longer examine particular burdens on religious exercises imposed on particular litigants by particular government rules, and then decide on a case-by-case basis which are legitimate. It abdicates that role to the judgment of legislators, seriously jeopardizing the protection of politically or religiously powerless minorities from majoritarian control.

As the instant case demonstrates, even when the legislature *has* acted, as in RFRA, to protect religious exercise.

[8] See Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 9.

that very legislative action is ignored or devalued, or subjected to unwarranted attack.[9] In addition, there are limits to the very legislative process that the majority in *Smith* outlines as the "preferred" alternative to litigation. While the recent decision in *Cutter v. Wilkinson*, __ U.S. __, 125 S.Ct. 2113 (2005), does clarify the law somewhat, the line between a valid accommodation and an invalid preference is not clear, and every legislative exemption still has to be defended against Establishment Clause challenges. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). As Justice Souter wrote, genuine substantive neutrality, "in addition to demanding a secular object, would generally require government to accommodate religious differences by excepting religious practices from formally neutral laws". *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 562 (1993) (Souter, J., concurring).

This Court has consistently stated it depends on history for guidance in interpreting constitutional text, especially the Religion Clauses. *Lynch v. Donnelly*, 465 U.S. 668, 673-78 (1984); *Marsh v. Chambers*, 463 U.S. 783, 786-92 (1983). But the majority opinion in *Smith* ignored history and tradition in reconstructing the Free Exercise Clause. In *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990), then-Professor, now Judge, Michael McConnell demonstrates that anecdotal, documentary, legislative, and judicial history point to one overarching theme of the Religion Clauses: in a clash between the dictates of conscience and the dictates of government, the *religious* conscience is to be given the benefit of every doubt. History and tradition show that when legislatures burden religion, the judiciary must be empowered to provide relief. *Id.*

But in *Smith*, a bare majority apparently reduced the Free

[9] See, Brief of Amici Curiae The Tort Claimants' Committee, *et al.*, previously filed herein.

Exercise Clause to "no more than an antidiscrimination principle". *Lukumi*, 508 U.S. at 578 (Blackmun, J., concurring). This shift makes it easier for courts, legislators, and executives simply to ignore sincere religious claims in particular cases, as the government argues it is entitled to do in the instant case. Under *Smith*, religion, long thought the "First Freedom," is treated "like everything else." *Smith* is bad law and bad policy, and should be reconsidered.

II. Jurisprudential Confusion Regarding Institutional Free Exercise Rights Must Be Resolved By Requiring Application of a Rigorous and Individualized Compelling Interest Test.

The Free Exercise Clause promises that religion is free to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). An overwhelming majority of this Court has stated that "the Free Exercise Clause. . ., by its terms, gives special protection to the *exercise* of religion," not merely to belief in a vacuum. *Thomas v. Review Board*, 450 U.S. 707, 713 (1981) (emphasis added). In *Smith*, this Court recognized the special needs of religious institutions, citing favorably to major opinions in which the Free Exercise rights of religious institutions were recognized and protected.[10] This case involves institutional, not just individual, concerns, and may be thought of as a clash between the law and the ability of a religion to practice what it preaches in its own institutions.

The facts of *Smith* presented whether an individual, based on his own religious preferences, could simply decide for himself what laws to comply with, "in effect to permit every citizen to become a law unto himself". *Smith*, 494 U.S. at 879

[10] Scholars argue that *Smith* should properly be read to affirm the rights of religious organizations. Kathleen Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 B.Y.U.L. Rev. 1633.

(citation omitted). The *Smith* majority also feared that recognizing individual, personalized objections to generally applicable laws would mean that there would be no standards by which various and different religious objections to a legal requirement could be distinguished. *Id.* at 880. *Cf. Gillette v. United States,* 401 U.S. 437, 457-8 (1971). These manifestly are not the same questions as whether religious institutions are protected in the exercise of their religious principles and choice of sacraments, by the application of a rigorous compelling interest test. The Free Exercise Clause "prohibits misuse of secular government programs 'to impede the observance of one or all religions * * * even though the burden may be characterized as being only indirect.'" *Id.* at 462 (internal citation omitted).

The *Smith* Court's analysis begins, however, 494 U.S. at 877, with approving reference to the very line of cases that clearly protects the autonomy of religious organizations, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969), and *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). In *Kedroff*, for example, the Court protected the right of a church to decide for itself questions of church governance as well as those of religious doctrine, based on the Free Exercise Clause. *Kedroff*, 344 U.S. at 115-16. This same "spirit of freedom for religious organizations, especially in matters of faith and doctrine," is nourished here by the lower courts' decisions that the government's burden on UDV would be tested by a "compelling interest" standard pursuant to RFRA.

One of the seminal cases in American jurisprudence relating to religious organizations, *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872), protects a religious denomination's liberty to conduct and structure itself in accord with its own religious principles "free from the invasion of the civil authority".

Watson, 80 U.S. at 730. Religious organizations themselves, not just individuals, have Free Exercise rights that are secured from governmental intrusion.[11]

This recognition of group religious rights and the interest in protecting even religious conduct perceived to be out of step with the political or cultural mainstream from "suppression by the majority" is precisely what application of an individualized and rigorous compelling interest test here promoted, and is conversely what the government's position rejects. The government suggests that once the categorical decision to place a substance on Schedule 1 has been made, then all religious expression involving its use can be suppressed. The subsequent Congressional decision to protect religious conduct by putting the government to its proof under RFRA is effectively nullified by the substance's Schedule 1 status.

Numerous courts interpreting *Smith* have explained that it "does not undermine the principles of the church autonomy doctrine". *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 656 (10th Cir. 2002); *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343, 348-50 (5th Cir. 1999) (describing *Smith* as oriented to

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[11] In *Smith*, the Court not only cited favorably to a long line of institutional autonomy cases, but also made reference to other cases recognizing a constitutional right to pursue organizational goals, and among others, religious goals. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). *Smith*, 494 U.S. at 882. "According protection to collective efforts on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority .... Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622.

individual violator's claims for exception from laws, not directed to a church's institutional Free Exercise rights). But even the law here is ambiguous: some courts tend to view institutional claims as worthy of protection only in two narrow sets of circumstances, those involving conflicting views of doctrine or claims by ministers against churches, leaving aside that the regulatory arena creates the greatest impact on religious belief as practiced through religious institutions. *Compare, Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67, 77-80 (Ca. 2004), with *id.* at 99-102 (Brown, J. dissenting). Churches and other religious organizations seem caught in the "intolerable tension in free-exercise law" which *Smith* has created. *Lukumi*, 508 U.S. at 574 (Souter, J., concurring in part and concurring in the judgment).

While institutions are constitutionally entitled to decide their values and beliefs, whether they can act in accordance with them depends on whether and how Government regulates those actions.[12] In relation to religious institutions specifically, this right is a necessary counterpart to individual Free Exercise rights since religious worship typically involves group activity and individuals depend upon their churches, temples, and other religious entities to provide the framework for the religious activity, rituals, and sacraments of their belief system.[13]

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[12] The right of private organizations to determine their own mission and purpose, to decide who they are, and be that and not something else, has repeatedly been sustained by the Court in analogous First Amendment settings. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

[13] See also discussion of *Roberts*, *supra* note 11. Whether the institutional right is the sum of the individuals' rights or something entirely different may depend on one's ecclesiology and theology. It would not be correct, necessarily, to presume that if no individual rights are violated, that ends the inquiry. *But see Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 303-4 (1985).

Religion has a special status in our legal system, and protection for a religious group's rights is not out of the ordinary, or an "exception", but the rule. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). This sometimes calls for governmental accommodation in favor of a religious organization. In *Walz*, for example, the Court saw the provision of a tax exemption to churches as having the beneficial effect of reducing the involvement of government with religion, and it is a goal of the Religion Clauses to avoid "the active involvement of the sovereign in religious activity". *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 668 (1970). When government becomes the decision-maker about what constitutes acceptable religious activity, then it can effectively (re)define religious activity by deciding what to regulate.

This is the same underlying rationale behind the Court's decision in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), where the Court took a proper view of the burdens that Title VII of the Civil Rights Act of 1964 would otherwise place on religious organizations, whether directly or indirectly, by subjecting them to religious anti-discrimination rules. Such rules run headlong into religious autonomy principles. These burdens were lifted by Congress's exemption. *Amos*, 483 U.S. at 336. "[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to . . . define their own doctrines . . . and run their own organizations". *Id.* at 341 (Brennan, J., concurring in the judgment)(internal quotation marks omitted). *Accord, Kedroff v. St. Nicholas Cathedral*, 344 U.S. at 116.

There is no denying the preferential value the Founders placed on religious freedom. "Madison looked upon . . . religious freedom . . . as the fundamental freedom." *Everson v. Board of Education*, 330 U.S. 1, 34 n.13 (Rutledge, J., dissenting) (quoting Irving Brant, JAMES MADISON: THE VIRGINIA REVOLUTIONIST 243 (1941). Jefferson recognized it

as "the most inalienable and sacred of all human rights." 19 THE WRITINGS OF THOMAS JEFFERSON 414-17 (Memorial ed., 1904), quoted in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 245 n.11 (1948) (Reed, J., dissenting). Madison argued that government should not interfere in religion "beyond the necessity of preserving public order, & protecting each sect agst. Trespasses on its legal rights by others." IX WRITINGS OF JAMES MADISON 484, 487 (Hunt, ed., 1904), quoted in *Everson*, 330 U.S., at 40 n.28 (Rutledge, J., dissenting). *See also Prince v. Massachusetts*, 321 U.S. 158, 164 (1944) (liberties guaranteed by the First Amendment have a "preferred position in our basic scheme"). Madison's view that government should not interfere in religion "beyond the necessity of preserving public order" is mirrored in the compelling interest test adopted in *Sherbert v. Verner, supra*. This case poses that question in a different form – does the "necessity of preserving public order" require individuals not to use Schedule 1 substances, but permit organizations to make limited sacramental use of one such substance unless the government can demonstrate that the compelling interest test has been met in relation to this substance in the context of this particular denomination's use of it? This distinction between an individual demanding an accommodation and a religious institution seeking the right to operate in accord with religious doctrine for the benefit of its adherents is explicit in the Court's treatment of religion and should control here. The interference with UDV goes to the core of its religious practices for its faithful. These intrusions must be subjected to the most rigorous scrutiny if religious autonomy is to continue to have vigor.

III. In a Heavily Regulated Society, Religious Institutions Are Increasingly Subject to Government Requirements Contrary to Their Religious Principles.

The tendency of a highly regulated society is to seek

conformity and override divergent views, particularly of minority religions and those expressing views that do not accord with prevailing public sentiment. Absent a reversal of the *Smith* rule or the expansion of statutory remedies, in a heavily regulated society religious organizations and individuals may have no alternative to legislative assistance to lift burdens the government has placed on their free exercise of religious principles. The consequence is, in many cases, simply to be forced to violate their own religious principles, or cease to exist, or find some way to live under the new regulatory regime. *See Kedroff v. St. Nicholas Cathedral*, 344 U.S. at 123-4 (Frankfurter, J., concurring). The failure of legislative accommodation – indeed, the expansion of government authority itself – is compromising religious liberty in ways that adversely affect our Society.

After *Smith*, government benevolence and accommodation was never more important.[14] A signal example of the need for this sort of governmental protection of religious practice is provided by the executive's, and subsequently the legislature's, accommodation of sacramental peyote use for the Native American Church and its faithful. The Food and Drug Administration exempted the religious use of peyote by way of 21 C.F.R. §1307.31 (listing of peyote as Schedule 1 controlled substance held not to apply to use in religious ceremonies of the NAC). Thereafter, in the American Indian Religious Freedom

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[14] The availability of a compelling interest test is far from being a panacea protecting all religious conduct. A compelling interest analysis may result in a decision in favor of the government regulation involved. *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School*, 696 A.2d 709 (N.J. 1997) (state interest in labor peace and enforcing collective bargaining rights outweighs burden on religious school's Free Exercise rights). *See also*, note 16, *infra*. And clearly, laws that impinged on religious exercise were sustained even before *Smith* was decided. *Cooper v. Eugene School District No. 4J*, 723 P.2d 298, 313 (Or.1986).

Act, 42 U.S.C. §1996a (2000), Congress barred state and federal government entities from interfering with peyote use as a sacrament in the NAC. Had it not been for these enactments, the logical result of *Smith*, analogous to the position taken by the government in this case, would have been that believers in the Native American Church would simply have to forego one of the central sacraments of their religion, or become scofflaws and accept the consequences.

Cutter v. Wilkinson, ___ U.S. ___, 125 S.Ct. 2113 (2005), both underscores the need for governmental accommodation of religion where the government's own rules have prevented religion from being freely exercised, and shows that government can legitimately act to lift burdens on religious practice. The Court in *Cutter* noted that the government had accommodated religious practice in the military by passing legislation which permitted Orthodox Jews to wear yarmulkes indoors while in uniform, 10 U.S.C. §774, even though the Army's uniform regulations which prohibit that had previously been sustained in the face of a Free Exercise challenge. *Goldman v. Weinberger*, 475 U.S. 503 (1986). Thus, even though the uniform rule was constitutional and relatively narrow (since it applied only when a service member was indoors, on duty and in uniform), the legislature could legitimately act to lift that burden since only by doing so could the religious needs of Orthodox service members be accommodated. The situation faced by UDV is of course much more extreme. There simply is no way for UDV faithful to participate in their sacraments under any circumstances, at any time, in the government's view. Unless RFRA and similar vehicles are taken seriously and vigorously enforced, accommodation will often be a pipedream and litigation will be conducted against long odds.

The reason why such regulatory exemptions are often necessary in our society was aptly put by Justice Kennedy in *County of Allegheny v. ACLU.* Writing for himself, Chief

Justice Rehnquist and Justices Scalia and White, he explained:

> In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

County of Allegheny v. ACLU, 492 U.S. 573, 657-58 (1989) (Kennedy, J., concurring in judgment and dissenting in part). As Justice Kennedy pointedly noted concurring in *Kiryas Joel v. Grumet*, 512 U.S. 687, 730 (1994):

> Religion flourishes in community, and the Establishment Clause must not be construed as some sort of homogenizing solvent that forces unconventional religious groups to choose between assimilating to mainstream America culture or losing their political rights.

Viewed from a Free Exercise perspective, neutral, generally applicable laws are necessarily "drafted . . . from the perspective of the non-adherent". *Lukumi*, 508 U.S. at 577 (Souter, J., concurring in part and concurring in judgment). The "modern administrative state" is inherently antagonistic to any particular religious viewpoint at all. That is why the needs of religious persons and institutions are so often ignored, sending what Justice Kennedy described as a "clear message of disapproval". *County of Allegheny*, 492 U.S. at 657.

Recent litigation provides a textbook example of the nature of the regulatory problems encountered by religious groups. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Ca.), *cert. denied*, ___ U.S. ___, 125 S.Ct.

53 (2004). California requires that all employers' insurance plans that provide coverage for prescription drugs "shall include coverage for . . . prescription contraceptive methods." Cal. Health and Safety Code §1367.25(a)(1)(2001), and Cal. Ins. Code §10123.196(a)(1)(2001). These statutes were held to be neutral and generally applicable. *Catholic Charities of Sacramento*, 85 P.3d at 82. Under the *Smith* rule, no Free Exercise claim against these statutes could be stated. *Id.*

These statutes do contain an exemption, available only to a "religious employer" as defined by the legislature, which "may request a [policy] without coverage for . . . contraceptive methods that are contrary to the religious employer's religious tenets". Cal. Health & Safety Code §1367.25(b), and Cal. Ins. Code §10123.196(d). But this exemption was constructed in a way that prevents most religious entities from qualifying for it, since only if the "inculcation of religious values is the purpose of the entity", and the "entity primarily employs persons who share the religious tenets of the entity", and it "serves primarily persons who share the religious tenets of the entity" and it is exempt from filing a Form 990 will this exemption apply.[15] *Id.* Catholic Charities of Sacramento makes its social service programs widely available to all without regard to the religion of the recipient. It provides and manages the Church's social ministry in the community, and employs many who do not share Roman Catholic religious beliefs. The California Supreme Court rejected the claim that the exemption opened the law to strict scrutiny under *Smith*. *Catholic Charities of Sacramento*,

[15] The Form 990 information return to the Internal Revenue Service has exemptions under 28 U.S.C. §§6033 (a) (2) (A) (i) and (iii) for churches and certain other religious organizations. Catholic Charities was not exempt. The other portions of the California "exemption" effectively limit even that narrow exemption to organizations that conduct only worship services, and not even all of them. Nearly all church auxiliary organizations are excluded from the exemption.

85 P.3d at 83.[16]

Since the largest number of religious entities which oppose contraception on moral grounds are Catholic, the effect of the law and the crabbed exemption impacts these agencies most. They face the "Hobson's choice" of either having to pay for actions they consider sinful, or of refusing to provide health insurance benefits they consider themselves religiously obligated to provide to their employees. Or, the agency could withdraw from public ministry and seek the narrow "exemption" by altering its mission, workforce, and ministry of community service. Efforts to persuade the legislature to enact a broader exemption were unsuccessful, based in part on the assertion that neutral rules were valid even if they burdened religion. As this example demonstrates, the government's extensive regulation of employer insurance coverage issues in the State of California, and its asserted power legislatively to determine what is "religious" and what is not, *id.*, effectively empowers the government to permit (or refuse to permit) any religious exercise.[17]

[16] The California Supreme Court rejected a series of church autonomy claims that the law interfered with the right of Catholic Charities to construct its religious workplace in accord with religious principles. *Id.* at 79-80. In the same way the court rejected other arguments based on hybrid rights and the state constitution. In the end the court did conclude the law served a compelling interest in promoting gender equity (one of several proffered by California). *Id.* at 92-4.

[17] Hawaii Revised Statutes §431:10A-116.6 and 10A-116.7 similarly require all employers providing health insurance plans to cover the provision of contraceptive products and services, and by artfully constructed language define away the availability of a "religious employers" exemption, §431:10A-116.7(a), even for the church itself. Even if the exemption applies, §431:10A-116.7(b), (c) and (e) require that the employee must be allowed to purchase such coverage himself, that no employee may be denied such coverage for contraceptive products, that the religious employer must give the employee written notice of how to obtain such coverage, and that it not be more expensive than the pro rata cost to the employer of such coverage

A case raising similar issues is *Catholic Charities of Albany, et al. v. Serio*, now pending in the Supreme Court of the State of New York Appellate Division, Third Department Appellate Division Docket No. 96221 (*sub judice*). In this case a group of Baptist and Catholic entities challenged a contraceptive mandate. The New York plaintiffs each fail the same regulatory criterion by which a "religious employer" is determined: they each serve the public without regard to religious affiliation. In these situations, a government's general power to make insurance law clashes with genuine religious (but in this society, minority) views on contraception. *Catholic Charities of Sacramento*, 85 P.3d at 103 (Brown, J., dissenting) (noting that the Catholic Church's views on contraception are "disparage[d] as archaic.") This legislation forces religiously-based social service organizations to decide between alternatives, each of which is entirely objectionable for religious reasons. "The question then is whether the coercive force of the law may be brought to bear to compel a religious organization that holds an alternative view, based on religious scruples, to support a hostile vision of the good." *Id.* The *Smith* rule enables such regulation, and that is wrong. *Id.* at 99. ("By protecting religious groups from gratuitous state interference, we convey broad benefits on individuals and society. By underestimating the transformative potential of religious organizations, we impoverish our political discourse and imperil the foundations of liberal democracy.")

The effect is that all denominations are at greater risk of either being forced to make a State-mandated regulatory choice – controlled, in many cases, by those interest groups having the

would have been. Thus, the State legislature has effectively required even exempt religious employers, as defined, to advise their employees how to obtain insurance for contraceptive services they consider sinful, and to subsidize the purchase of these services and supplies through overhead payments and premiums borne by all employers.

greatest influence over the legislature involved – or to forego their legitimate autonomy.[18] Forcing religious organizations to subsidize the very thing they preach against strikes at the very heart of the organization's ability to pursue the church's message and mission. *See Corporation of Presiding Bishop v. Amos*, 483 U.S. at 341 (Brennan, J., concurring in the judgment)(recognizing a right on the part of religious organizations to order their own affairs and run their own institutions). The decision in *Catholic Charities of Sacramento* also threatens to reorder authority within the Church, and gives each employee of Catholic Charities the power to decide whether Catholic Charities, notwithstanding its religious convictions, will pay for contraceptives. This, in effect, allows employees' personal preferences to trump the organization's free exercise rights.

Equally troubling in both Catholic Charities cases was the legislature's explicit attempt, in crafting a limited exception, to define which religious organizations it considers religious or not. Plainly, the state may not decide "what is or is not secular, what is or is not religious." *Lemon v. Kurtzman*, 403 U.S. 602, at 637 (1971) (Douglas, J., concurring). Under these insurance statutes, the state decides that organizations are truly religious only if they teach, serve, and employ only their co-religionists, and has imposed special penalties on those it considers insufficiently religious. "[S]uch a crabbed and constricted view of religion . . . would define the ministry of Jesus Christ as a secular activity." *Catholic Charities of Sacramento*, 85 P.3d at 106 (Brown, J., dissenting). Although definitions of religiosity differ among religions, it is not the place of the state to

[18] In 2004, Illinois also mandated that employers provide insurance coverage encompassing contraceptive services. 215 Ill. Comp. Stat. 5/356z.4. This legislation provides no exemption for religious organizations that purchase insurance for their employees, despite the Illinois Health Care Right of Conscience Act, 745 Ill. Comp. Stat. 70/1, *et seq.*

determine which are genuine.[19]

The government's power to define is frequently also its power, intentionally or not, to restrict and prohibit. In *Espinosa v. Rusk*, 634 F.2d 477, 479-82 (10th Cir.), *sum. aff'd*, 456 U.S. 951 (1982), a city ordinance that required "secular" but not "evangelical missionary or religious" activities to obtain city permits before operating, was applied to a Seventh-day Adventist charity drive supporting church activities after city officials determined the drive to be "secular". The ordinance was struck down for free exercise reasons based on *Cantwell*, because "an administrative determination as to what was religion or religious" was constitutionally objectionable, and "necessarily a suspect effort". *Id.* at 481. This attempted definition of what was religious failed the compelling interest test. *Id.* at 482. Without having to meet such a test, civil authority may with impunity define into illegality religious conduct, with no significant weight being given to the protection of free exercise values.[20] "Definition may be just as pernicious

[19] Religious institutions' free exercise rights were similarly implicated in *University of Great Falls v. National Labor Relations Board*, 278 F.3d 1335, 1341-42 (D.C. Cir. 2002) (rejecting NLRB's assertion of jurisdiction based on claim that college lacked "substantial religious character"). The NLRB had purported to decide that a Catholic college was actually a "secular institution" because it admitted non-Catholics as students, hired non-Catholics as faculty, and respected other denominations' religious expressions. The D.C. Circuit held that "to limit ... exemption [from NLRB jurisdiction] to religious institutions with hard-nosed proselytizing ... is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment Clause – not to prefer some religions (and thereby some approaches to indoctrinating religion) to others." *University of Great Falls*, 278 F.3d at 1346.

[20] In a recent decision, the Fifth Circuit rejected a religious persecution claim from a Chinese Christian, notwithstanding evidence of imprisonment, physical punishment, and loss of his job as a result of belonging to an unauthorized church. The panel held that he was not persecuted for what he believed, but for his conduct of belonging to an unregistered church, which

as ongoing monitoring if its purpose is to suppress or burden religious conduct." *Catholic Charities of Sacramento*, 85 P.3d at 102 (Brown, J., dissenting).[21]

For example, a California state statute requires all health care facilities, even Catholic health care facilities, to perform abortions if a "medical emergency situation" is thought to exist. California Health and Safety Code §12342D(d). This law is neutral and generally applicable, and so is not assailable under the *Smith* rule. In contrast, the Hyde/Weldon Amendment to the Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, Div. F, §508(d), 118 Stat. 2809, 3163 (2004), provides a conscience clause. It is intended to ensure that federal funds are not made available to support health programs that discriminate against religious healthcare organizations by requiring them to provide, pay for, or refer for abortions. This specific statutory protection for the rights of institutions, like RFRA, is necessary precisely because the *Smith* approach does not provide such organizations with effective protections against being required to perform activities that they consider gravely wrong. In fact, the serious need for such protection for institutional religious

the court said the Chinese government was free to criminalize or otherwise regulate. Violating a law of general applicability regulating religious practice resulting in physical and economic punishment did not constitute religious persecution. *Li v. Gonzales*, 2005 WL 1870773, *6 (5th Cir. 2005).

[21] Where government officials had the discretion, even under an apparently religion-neutral regulatory scheme, to decide whether the convening of Bible study meetings in a public park could be interpreted to constitute "disorderly conduct" within the meaning of a state statute, that violated both the First and Fourteenth Amendments. *Niemotko v. State of Maryland*, 340 U.S. 268, 272 (1951). This is particularly so when minority religious views are implicated, as in *Niemotko*, and the state has purported to define certain religious activities as criminal when others are not so defined. *Id.* Under *Smith*, *unpopular* views suffer the most, and the result will likely be unjust. The use of the pre-*Smith* balancing test provided some standards by which government could be held accountable on judicial review to explain their actions.

exercise is underscored by the fact that the State of California has now sued the United States to enjoin the implementation of the Hyde/Weldon Amendment, as unconstitutional. *State of California ex rel. Bill Lockyer, et al. v. United States, et al.*, Civ. No. C-05-00328 JSW (N.D.Ca.).

Other attempts at government "reengineering" of church organizations have succeeded. In *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004), a district court upheld the constitutionality of a Portland, Maine, ordinance that no organization could receive City Housing and Community Development ("HCD") funds for social service programs, unless the organization provided the unmarried partners of their employees with the same health and fringe benefits as they would provide to the spouses of their married employees. Although it had long provided social services using HCD funds, Catholic Charities refused to agree to provide such benefits on religious grounds, and sued the City of Portland when it withdrew its funding for those social service programs. The court rejected Catholic Charities' federal free exercise claim that the city government had thereby unconstitutionally burdened Catholic Charities' religious practices, based on the proposition that "neutral laws of general applicability are constitutional, even if they incidentally burden religious beliefs or practices." *Id.* at 94. Again, a religious organization was left by the courts in the untenable position of being forced by government action to cease to provide services that it was religious compelled to provide, or to forego the governmental assistance it would otherwise have been accorded, or to act contrary to its own moral and religious principles.

These threats to the institutional free exercise rights of religious organizations are real, not hypothetical. For this reason, legislative efforts like RFRA, and judicial efforts to scrutinize government conduct are vital to the protection of religious liberty, and consequently, the important place of

religious institutions in our Society. One thing is clear, however. Unless the Court acts decisively to renew protections for religious institutions, these examples will only become more numerous.

CONCLUSION

In the Nineteenth Century, in an effort to "democratize" the Catholic Church in accord with then-prevailing political sentiment, the State of New York passed laws requiring that religious property could only be held by trustee corporations, along the lines of congregational churches. Philip Hamburger, *Illiberal Liberalism: Liberal Theology, Anti-Catholicism, and Church Property*, 12 J. Contemp. Legal Issues 693, 710 *et seq.* (2002). Whether this blatant interference in religious governance would be tested under strict scrutiny as discriminatory today would depend on how the statute was phrased and intended. *Cf. Lukumi*, 508 U.S. at 533. A broadly written statutory scheme to do this would today be defended under *Smith*. In the Twenty-first Century, the "long, unedifying history" of attempts of government to re-form religion continues: but it is over beliefs which some regard as archaic or harmful to individual political interests. *Catholic Charities of Sacramento*, 85 P.3d at 103 (Brown, J., dissenting); Mark E. Chopko, *Shaping the Church*, 53 Cath. U. L. Rev. 125, 144-5 & n. 109 (2003). The pre-*Smith* law was not perfect but at least there was a place for religious organizations to stand to resist the pressures to conform to the cultural norm. *Smith* insulates those inclined towards the application of governmental pressure, from effective judicial review. While RFRA and legislative efforts to protect religious exercise are vital, more basically, this Court should assure that whatever *Smith* portends in the future, it not insulate regulators from the Constitution.

The judgment below should be affirmed.

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